Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 77-

76-1576

JESSE A. HELMS,
JAMES A. McCLURE,
STROM THURMOND,
DANIEL J. FLOOD,
LAWRENCE P. McDONALD,
M. GENE SNYDER,
WILLIAM R. DRUMMOND,

Plaintiffs-Petitioners,

v.

CYRUS R. VANCE,
ELLSWORTH BUNKER,
JAMES E. CARTER, JR.,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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11 May 1977

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Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the dismissal of their action for a declaratory judgment that under the Constitution Congress has exclusive authority to dispose of territories of the United States.

OPINIONS BELOW

The order of the Court of Appeals was issued without opinion and has not been officially reported. A copy is annexed (App. 1a). The opinion and order of the United States District has not been officially reported. A copy is annexed (App. 2).

JURISDICTION

The order sought to be reviewed was entered on May 3, 1977. The jurisdiction of this Court arises under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the question of the President's power to dispose of the Canal Zone by treaty to the Republic of Panama is ripe for judicial determination.

STATUTES

United States Constitution, Article II, Section 2

> "Clause 2. [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . ."

United States Constitution, Article IV, Section 3, cl.2

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

United States Constitution, Am. 5

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1 Canal Zone Code § 31 (Pub. Law 87 - 845, 76 A. Stat 1)

> § 31. Rights and guarantees
>
> The principles of government enumerated below, that are essential to the rule of law and the maintenance of order, have applicability and force in the Canal Zone:
>
> (1) Bills of attainder and ex post facto laws are void.
>
> (2) Laws respecting the establishment of religion or prohibiting the free exercise thereof are void.
>
> (3) Laws abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for a redress of grievances are void.
>
> (4) The right of the people to be secure against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(5) A person may not be:

(A) put twice in jeopardy for the same offense; or

(B) compelled in any criminal case to be a witness against himself; or

(C) deprived of life, liberty, or property without due process of law.

(6) Private property may not be taken for public use, without just compensation.

(7) In criminal prosecutions, the accused has the right to:

(A) a speedy and public trial;

(B) be informed of the nature and cause of the accusation;

(C) except as provided by section 3507 of Title 6, be confronted with the witnesses against him;

(D) produce witnesses in his behalf and have compulsory process for obtaining them; and

(E) have the assistance of counsel for his defense.

(8) Excessive bail may not be required, nor excessive fine imposed, nor cruel or unusual punishments imposed.

(9) Slavery and involuntary servitude may not exist, except as a punishment for crime. 76A Stat. 2.

35 C.F.R. § 3.2

§ 3.2 Secretary of the Army as representative of President.

(a) Pursuant to 2 C.Z.C. 31 and 62(b), respectively (76A Stat. 7 and 9), the Secretary of the Army is designated as the officer of the United States to supervise the administration of the Canal Zone Government by the Governor, and to act as "stockholder" of the Panama Canal Company.

(b) In performing his functions under § 3.2(a), the Secretary of the Army shall act as the direct representative of the President of the United States, and not in his capacity as head of the Department of the Army.

STATEMENT OF THE CASE

The history of the acquisition of the Canal Zone by the United States is too well known to require detailed exposition. In summary, Congress approved the "Spooner Act" in 1902 directing the Executive to acquire perpetual land rights in Panama (then Columbia) or in Nicaragua to permit the construction of an inter-ocean canal. In 1903 citing the Act as his authority, the Executive negotiated the Hay-Bunau-Varilla treaty acquiring such rights from the newly independent Republic of Panama. Congress thereupon bought the French canal concession, purchased all privately owned land in the Zone, paid compensation to Columbia and constructed the present Canal. Thereby the zone became a territory of the United States, *Wilson* v. *Shaw*, 204 U.S. 24, 33; 27 S.Ct. 233, 235 (1907), *Vermilya-Brown* v. *Connell*, 335 U.S. 337, 69 S.Ct. 140 (1948), *U.S.* v. *Husband R. (Roach)*, 453 F.2d 1054, (5 Cir. 1971) *cert. den.* 406 U.S. 935.

In 1974 the defendant Vance's predecessor, Secretary Kissinger issued a joint proclamation with Panama sometimes known as the Kissinger-Tack agreement (App. 40a) which provides in part:

> "The United States and Panama agree that the Treaty of 1903 should be replaced by a modern treaty that rejects the concept of perpetuity . . ."
>
> (App. 47a)

> "2. The United States has proposed that Panamanian law and jurisdiction would be applied in the Canal Zone . . ."
>
> (App. 48a)

The joint statement of 1974 is now said by the Department of State to

> " . . . provide [d] the framework for the present negotiations. Both Presidents Ford and Carter have authorized the continuation of talks based on the general points outlined in the 1974 Joint Statement."
>
> (App. 22a)

In 1976 the executive branch announced that a treaty with Panama in these terms would be completed in 1977, (App.).*

On January 14, 1976, the plaintiffs-petitioners initiated this action in the United States District Court for a declaration that the constitutional authority to dispose of the Canal Zone or to submit the United States citizens resident there to Panamanian law is exclusively within the powers of the Congress and is not a subject for executive determination under the President's treaty powers (App. 39a).** The action was dismissed (App. 14a) and that dismissal was affirmed on the ground that the issue was not "ripe for consideration" (App. 1a).

On substantially the same grounds petitioners' motion for a temporary injunction to preserve the status quo in the Zone pending judicial determination of the issue on the merits (App. 25a) was dismissed by the District Court (App. 20a) and that dismissal was also affirmed by the Court of Appeals (App.).

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*Since the filing of this action and change of administration, June 1977 has been set as the target date. (Finding of District Court (App. 16a); Helms affidavit on motion for expedited hearing.)

**Service on the defendants was quashed for non-residence in a prior action on the same grounds brought in the Canal Zone District Court sub nom. *Drummond v. Bunker* (C.A. 76-0353-B).

REASONS FOR GRANTING THE WRIT

A. The Issue is Substantial and In the Action

The Constitution provides complete Congressional power over the disposition and governance of territories,

> "Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States;"
>
> Art. IV, Sec. 3

Such power includes the authority to prescribe the times, conditions and mode of transfer thereof, and to designate the persons to whom the transfer shall be made, *Gibson* v. *Chouteau,* 13 Wall. 92, 99 (1872), *Irvine* v. *Marshall,* 20 How. 558 (1858), *Emblen* v. *Lincoln Land Co.,* 184 U.S. 660, 664, 22 S.Ct. 523, 525 (1902).

> "Article IV, Section 3 of The United States Constitution commits the management and control of the lands of the United States to Congress. That Congressional power is unlimited."
>
> *Sierra Club* v. *Hickel,* 433 F.2d 24, 28 (9 Cir. 1970), *aff'd,* 405 U.S. 727, 92 S.Ct. 1361 (1972)

The power so given is exclusive to Congress, *United States* v. *Fitzgerald,* 40 U.S. 785, 15 Pet. 407, 421 (1841); *Osborne* v. *United States,* 145 F.2d 892 (9 Cir. 1944); *Alabama* v. *Texas,* 347 U.S. 272, 74 S.Ct. 481 (1954); and any authority of the President to dispose of property (*e.g.,* Phillipines) must be derived from an Act of Congress, *Tugade* v. *Hoy,* 265 F.2d 63 (9 Cir. 1959).

The Canal Zone is a territory of the United States. The title of the United States to that Zone is complete and perfect,

> "It is hypercritical to contend that the title of the United States is imperfect, and that the [Canal Zone] does not belong to this nation, because of the technical terms used in ordinary conveyances of real estate."
>
> *Wilson* v. *Shaw*, 204 U.S. 24, 33, 27 S.Ct. 233, 235 (1907)

Accord: Lucas v. *Lucas*, 232 F. Supp. 466, (D.C.C.Z., 1964); *Huasteca Petroleum Co.* v. *United States*, 14 F.2d 495 (E.D.N.Y. 1926).

The only defense of the merits which is presumably available to respondents is for them to assert the existence of concurrent constitutional authority in the executive to dispose of a territory of the United States (U.S. Const, Art. II, Sec. 2) This argument was once advanced by the Department of Justice with respect to the Canal Zone.

> "We believe, however that the consideration favoring the second alternative, for example, that the legislative and treaty powers are concurrent in this field, are more convincing."
>
> (Testimony of Ralph E. Erickson, Deputy Ass't Atty. Gen'l., Hrgs. on Treaties Affecting the Operations of the Panama Canal, Hse. Comm. on Merchant Marine and Fisheries, 92d Cong. 2d Sess. ser. 30, p. 97 (1972))

So far as petitioner know no court or even commentator has ever stated that the treaty power of the executive extends to

the disposition of the property of the United States. There are many holdings of this and other courts that it does not, that the treaty power is limited by the authority granted to coordinate branches by the Constitution, *De Geofroy* v. *Riggs*, 133 U.S. 258, 267, 10 S.Ct. 295, 297 (1890) *Wisconsin R. Co.* v. *Price County*, 133 U.S. 496, 507 (1890); *Peirce* v. *State of New Hampshire*, 13 N.H. 536, *aff'd* 46 U.S. 504, 5 How. 504, 12 L.Ed. 256 (1847), *Zweibon* v. *Mitchell*, 516 F.2d 594 (1975), *Consumers Union of U.S.* v. *Rogers*, 352 F. Supp. 1319 (D.D.C. 1973); *Schactman* v. *Dulles*, 255 F.2d 938, 945 (U.S. App. D.C. 1955, conc. op. of Edgerton, J); *Farmer* v. *Rountree*, 149 F. Supp. 327 (M.D. Tenn. 1956) *aff'd* 252 F.2d 490 *cert. den.* 337 U.S. 906.

As stated by Mr. Green Hackworth, then the State Department Legal Advisor, to Congress in 1943,

> "The fact that our property rights in Panama were acquired by the treaty process does not in the slightest degree derogate from the authority of Congress to dispose of them. Its authority is the same whether the property was acquired by treaty, gift, purchase, or otherwise.
>
> There are inmunerable instances in which property acquired by the United States by treaty or convention, or other international agreement, has been disposed of by the Congress, or the Congress has authorized the Executive to dispose of it. I have in mind the disposition of public lands acquired by the United States by treaties, such as those acquired from France in 1803, commonly referred to as the Louisiana Purchase, the territory acquired from Spain under the treaty of 1819, the Floridas and the territory acquired from Mexico under the Treaty of Guadalupe Hidalgo in 1848 and the Gadsden Treaty of 1853."

For authority, Mr. Hackworth cited the opinion of the then Attorney General, later Mr. Justice Harlan F. Stone,

> "The Constitution (art. 4, sec. 3, cl. 2) gives to Congress the power 'to dispose of * * * property belonging to the United States,' and Mr. Justice Thompson sitting in Circuit, in U.S. v. Nicoll (27 Fed. Cas. 15879 pp. 149 - 150) – an early case concerned with the disposition of personal property – said
>
> > 'No public property can, therefore, be disposed of without the authority of law, either by an express act of Congress for that purpose, or by giving the authority to some department of the Government or subordinate agent. See also Wisconsin R. Co. v. Price County (133 U.S. 496, 507)'
>
> * * * * * * * * * * * *
>
> It follows, then, that property once acquired by the Government may not be sold, or title otherwise disposed of except under the authority of Congress, and in the manner provided by law, and this prohibition extends to any attempt to alienate a part of the property or in general in any manner to limit or restrict the full and exclusive ownership of the United States therein. *** (34 Op. Att. Gen. 320, 322)."
>
> Hearings Before The Committee on Foreign Affairs, House of Representatives on H.J. Res. 14 at pages 9 - 11 (March 16, 1943)

Nor may the president's treaty powers be used to contravene existing Congressional legislation

> "All parties recognize that if in fact Congress has preempted the relevant field of foreign trade and commerce, then the President lacks authority to act in a manner inconsistent with the requirements of the preemption legislation.
> * * *
>
> The President clearly has no authority to give binding assurances that a particular course of conduct, even if encouraged by his representatives, does not violate the Sherman Act or other related congressional enactments any more than he can grant immunity under such laws.
>
> *Consumers Union of U.S., Inc. v. Rogers, supra* at pp. 1322 - 1323
>
> "Support for judicial deference to executive actions in the area of foreign affairs is found in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) and *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). Without deprecating the support given by dicta in these opinions to inherent presidential authority in foreign affairs, we note that the presidential authority was there exercised pursuant to statute, i.e., by the will of Congress. Justice Jackson, concurring in the *Steel Seizure Case,* pointed out:
>
> > 'When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling Congress from acting upon the subject.' "

> *United States v. American Telephone and Telegraph Company, et al. and John E. Moss, Member, United States House of Representatives,* ___ F.2d ___, (U.S. App. D.C. Dec. 1976 at p. 17 of slip opinion)

Confirming this, all previous executive proposals to give portions of the Canal Zone to Panama have been made subject to prior Congressional direction, e.g. 59 Stat. (pt. 2) 1289, E.A.S. No. 452

> "When the authority of the Congress of the United States shall have been obtained therefor, the Government of the United States will transfer to the Republic of Panama," etc.

Congress did so authorize the transfer, Act of May 3, 1943, ch. 92, 57 Stat. 74.

Again in a 1955 treaty, it was provided

> "The United States of America agrees that, subject to the enactment of legislation by the Congress, there shall be conveyed to the Republic of Panama . . ." etc.

Congress did in fact pass such legislation, Act of Aug. 3, 1957, Pub. L. No. 85 - 223, 71 Stat. 509.

In 1973 President Nixon announced that he would propose a bill to Congress in order to dispose of two Zone airfields to Panama, 70 Dep't State Bull. 456 (1974).

In sum there appears to be little question but that petitioners have shown considerably more than a sufficient likelihood of success on the merits of the suit and the action of the executive branch to defeat this right of Congress is substantial.

B. The Issue is Within the Jurisdiction of This Court

A case involving the division of basic constitutional powers between the legislative and executive branches is directly within the jurisdiction of this Court under 28 U.S.C. § 1331, *United States v. Am. Tel. & Tel. Co. and John Moss, United States House of Representatives,* _____F.2d _____, (Dec. 30, 1976), *Senate Select Comm. on Presidential Campaign Activities v. Nixon,* 498 F.2d 725 (App. D.C. 1974), *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, (1974).

> "The Government also contends that if the President is not held immune from this and similar lawsuits, there will be intolerable interference with the effective functioning of Government. To begin with, there is serious question whether presidential actions inconsistent with congressional mandates constitute effective Government. Moreover, as Mr. Justice Brandeis observed in his dissenting opinion in Myers v. United States, 272 U.S. 52, 293, 47 S.Ct. 21, 85, 71 L. Ed. 160 (1927), the doctrine of separation of powers was established in the Constitution not to promote governmental efficiency but to prevent arbitrary power.
>
> * * * The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.* * *

Under our system of law, the judiciary has a duty envisioned by the constitutional principle of checks and balances to keep both the Executive and Congress within their respective constitutional domains in order to prevent that concentration of power which the Founding Fathers so feared. *See The Federalist,* Number 51. This suit presents neither a political question nor a challenge to Executive discretion. Thus, in the circumstances of this case, this Court should be extremely reluctant in light of the fundamental constitutional reasons for subjecting Executive actions to the purview of judicial scrutiny to hold that the federal judiciary lacks power to compel the President to perform a ministerial duty in accordance with the law."

National Treasury Employees Union v. Nixon, 492 F.2d 587(U.S. App. D.C. 1974) at pp. 611-612

C. The Issue is Ripe for Decision At This Time

The decision of the Court below is contrary to the prior holdings of this Court. The criteria of ripeness were set out in the *Maryland Casualty* decision:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial

> controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See Aetna Life Ins. Co. v. Hayworth, 300 U.S. 227, 239-242, 57 S.Ct. 461, 463, 464, 81 L.Ed. 617, 108 A.L.R. 1000. It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case. Nashville, etc., Ry. Co. v. Wallace, supra, 288 U.S. page 261, 53 S.Ct. page 347, 77 L.Ed. 730, 87 A.L.R. 1191.
>
> That the complaint in the instant case presents such a controversy is plain."

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 61 S.Ct. 510, 512 (1941)

In the lower Courts, respondents contended that nonripeness was shown by the decision in the *Aetna Life Ins. Co.* case. To the contrary as that opinion shows

> "Our conclusion is that the complaint presented a controversy to which the judicial power extends and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act."

Aetna Life Ins. Co. of Hartford, Conn v. Haworth, 300 U.S. 227, 244 57 S.Ct. 461, 465 (1937)

It is true that in *O'Shea v. Littleton* this Court held that an issue was not ripe for determination where no specification was in question or threatened,

"The foregoing considerations obviously shade into those determining whether the complaint states a sound basis for equitable relief; and even if we were inclined to consider the complaint as presenting an existing case or controversy, we would firmly disagree with the Court of Appeals that an adequate basis for equitable relief against petitioners had been stated stated. The Court has recently reaffirmed the 'basic doctrine of equity jurisprudence that courts of equity should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.' Younger v. Harris, 401 U.S. 37, 43 - 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971).

* * * *

Respondents do not seek to strike down a single state statute, either on its face or as applied; nor do they seek to enjoin any criminal prosecutions that might be brought under a challenged criminal law. In fact, respondents apparently contemplate that prosecutions will be brought under seemingly valid state laws. What they seek is an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials."

O'Shea v. Littleton, 414 U.S. 499, 94 S.Ct. 669, 677-78 (1974)

Petitioner do not regard *O'Shea* as precedent to the contrary of their present position, since the challenge here is to a specific provision of the Constitution.

We come now to the question of whether the immediacy involved here presents only a conjectural and hypothetical injury. Respondents by affidavit told the lower court that they had been negotiating with Panama regarding the Canal Zone for thirteen years, have met in fifteen sessions, that the issues currently under discussion are the most delicate and difficult to resolve and that a proposed order to hold the Zone in American hands pending decision in this case could "cause irreparable damage to the present negotiating effort, as well as to our relations with Panama." (App. 24a) The District Court found that a conclusion of the negotiation had been announced for June 1977, (App. 16a ¶ 5).

And it was in that affidavit that the State Department affirmed that the 1974 statement was the "framework" for the present negotiation (App. 22a). The Joint Statement said:

"The principles to which we have agreed, *on behalf of our respective governments* (emphasis added), are as follows:

1. The treaty of 1903 and its amendments will be eliminated . . .
2. The concept of perpetuity will be eliminated . . .
3. Termination of United States jurisdiction over Panamanian territory shall take place promptly . . .
4. The Panamanian territory in which the canal is situated shall be returned to the jurisdiction of the Republic of Panama . . .

(pp. 2-3)

"2. *Jurisdiction.* The United States has proposed that Panamanian law and jurisdiction would

be applied in the Canal Zone . . ."

(*id.* p. 7)

(App. 41a, 48a)

In other words the respondents concede that they will propose a treaty which will directly override and nullify all existing legislation enacted by Congress for the Zone. This is not a proper executive action. In considering an executive agreement on importation of foodstuffs from Canada in contravention of the Agricultural Adjustment Act, the District of Columbia Circuit had occasion to say, *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (1953), aff'd. 348 U.S. 296, 78 S.Ct. 326 (1955)

> "It is argued, however, that the validity of the executive agreement was not dependent upon the Act of Congress but was made pursuant to the inherent powers of the President under the Constitution. The answer is that while the President has certain powers under the Constitution such as the power pertaining to his position as Commander in Chief of Army and Navy and the power necessary to see that the laws are faithfully executed, the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress. It cannot be upheld as an exercise of the power to see that the laws are faithfully executed, for, as said by Mr. Justice Holmes in his dissenting opinion in Myers v. United States, 272 U.S. 52, 188, 47 S.Ct. 21, 85, 71 L.Ed. 160, 'The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require

> him to achieve more than Congress sees fit to leave within his power.'"
>
> 204 F.2d at p. 659

Petitioners have already pointed to the same rule in the *Consumers Union* case which held:

> "All parties recognize that if in fact Congress has preempted the relevant field of foreign trade and commerce, then the President lacks authority to act in a manner inconsistent with the requirements of the preemption legislation."
>
> *Consumers Union of U.S., Inc. v. Rogers, supra,* at p. 1322

As shown, there is a substantial controversy between these parties, it has sufficient reality to warrant the issuance of a declaratory judgment, and there is only the factor of "sufficient immediacy" needed to complete the requirements given in the *Maryland Casualty* decision.

On that we refer to the record before the lower Courts, where the affidavits of Senator Helms (App. 26a) and Mr. Luers (App. 21a) established that current negotiations were being concluded with Panama.

Additionally, the supplementing affidavit of Senator Helms submitted to this Court on petitioners' accompanying prayer for an expedited hearing shows that the Panamanian Republic has now reached the point of a day-to-day demand for a conclusion to the treaty negotiation on the part of the United States. A chief negotiator of the proposal, Mr. Sol Linowitz, was appointed by the new administration to serve for less than six months. The President is in personal control of Zone affairs, 35 C.F.R. § 3.2. Announcements have been made by the Panamanian authorities that the present debate in the negotiation is what ships Panama will permit to go through the Canal and that Panama is prepared to use *in terrorem* tactics

against the United States to compel an immediate decision on the remaining issues.

The "substantial immediacy" factor is therefore also present in this situation and a proper case for a declaratory judgment at this time has been shown.

D. The Rights of 3500 Citizens May Be Lost Without a Hearing.

In the Canal Zone Code, Congress provided a Bill of Rights for all Zone residents, 1 C.Z.C. § 31. Those provisions are equivalent to the Bill of Rights in the Constitution, *United States v. Husband R. (Roach), supra,* and any threatened interference with a citizen's recourse to the Bill of Rights constitutes an irreparable injury, *Illinois Migrant Council v. Pilliod,* 540 F.2d 1062 (7 Cir. 1976), as a denial of due process under the Fifth Amendment.

This forced submission of 3500 United States citizens to Panamanian jurisdiction and courts was stated to be the defendant's treaty objective in the Kissinger - Tack agreement of 1974. No suggestion is made by respondents that these people would have any say in the loss of their rights. Presumably they could thereafter be executed or jailed under Panamanian law without recourse to any court of the United States.

The treaty proposed would also totally destroy the form of government established by Congress for these and other Canal Zone residents, repeal applicable laws of the United States enacted for their protection as well as eliminating the courts in which they are enforced. Such action would be a repeal by treaty of the very laws which the President has sworn to uphold, and would constitute on its face an irreversible injury which no subsequent court action could effectively overcome.

E. The Public Interest Will be Served By a Present Determination on the Merits.

As indicated in Senator Helms' affidavit in the record (App. 30a), the respondents are aware of the weight of Congressional opposition to any transfer of the Canal Zone to Panama, particularly in the House of Representatives. There is some reason to believe that the respondents' activities are designed to avoid Congressional review of their proposed terms.

The present question then is whether Congress or the Executive represents the public interest – apart from the necessary public interest in having the question finally determined. Petitioners assert that the view of Congress is more properly a measure of the public interest on such a question and that the submission of this issue to the Congress as a bill will better serve that interest than having it concluded by the unreviewable fiat of the respondents. Petitioners see the Executive's proposed treaty action as a deliberate and knowing avoidance of submission to the public's representatives in Congress and one which is being made in open defiance of the Presidential obligation to see that the existing laws of the United States are enforced.

But whether Congress or the President has public interest primacy on the question of who the Canal Zone shall belong to, there is, as said above, a major public interest in having the issue judicially determined and the case should not be left in a state where the issue can be effectively mooted by premature action of the respondents prior to a judicial decision on the point.

CONCLUSION

Petitioners pray this Court to grant their application for a writ of certiorari to review the decision of the Court of Appeals on the grounds that the issue on the merits is shown to be timely, real and substantial, the lower court's decision is contrary to the holdings of this Court, that its denial would constitute a total deprivation of civil rights to all American citizens living in the Canal Zone, would contradict all Congressional legislation enacted for the governing of that Zone, destroy all institutions set up there by Congress, and deprive the United States of that territory without the prior concurrence of the Congress.

Respectfully submitted,

GEO. S. LEONARD, Esq.
1019 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Plaintiffs-Petitioners

May 11, 1977

CERTIFICATE OF SERVICE

Three copies of the foregoing paper have this day been served upon the Solicitor General of the United States as attorney for defendants by delivering the same to his office by hand.

/s/ GEO. S. LEONARD, Esq.

May 11, 1977

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 77-1226 and 77-1295 — September term, 1976

Jesse A. Helms, et al., Appellants — Civil Action 77-0083

v.

Cyrus R. Vance, Department of State, et al.

FILED May 3, 1977
GEORGE A. FISHER
CLERK

BEFORE: Wright and McGowan, Circuit Judges

ORDER

On consideration of appellant's motions for consolidation and for expedited hearing, appellant's suggestion for hearing *en banc*, of appellee's motions for summary affirmance and of the responses to the foregoing it is

ORDERED by the Court that the motion to consolidate is granted and Nos. 77-1226 and 77-1295 are consolidated, and it is

FURTHER ORDERED by the Court that the motion for expedited hearing is denied, and it is

FURTHER ORDERED by the Court that the suggestion for hearing *en banc* is denied and, it appearing to the Court that the matters presented in these appeals are not ripe for consideration it is

FURTHER ORDERED by the Court that the aforesaid motions for summary affirmance are granted and the orders of the District Court on appeal in Nos. 77-1226 and 77-1295 are hereby summarily affirmed.

The Clerk is directed to send a certified copy of this order to the District Court.

Per Curiam

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JESSE A. HELMS, et al.,
Plaintiffs,

v. Civil Action No. 77-83

CYRUS VANCE, et al.,
Defendants.

FILED
MAR 23 1977
JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

This action was initiated by a complaint for declaratory relief against the President,[1] the Secretary of State and a United States Ambassador at Large who has been engaged in treaty negotiations with the Republic of Panama. Plaintiffs, who include several members of the Senate and the House of Representatives as well as one United States citizen who is a resident of the Panama Canal Zone, sought a declaration by the court that the power of Congress is exclusive with respect to any disposition of jurisdiction over the Canal Zone. The suit was apparently prompted by current negotiations between the executive branch and representatives of the Republic of Panama which plaintiffs

[1] Also pending at this time, in addition to the motion to dismiss, is a motion by the United States Attorney for leave to appear as *amicus curiae* for purposes of suggesting that the President be dismissed as a party. In view of the court's ruling on the motion to dismiss, it is unnecessary to consider the issue of whether the President is a proper party.

believe will have the eventual result of transferring dominion and control of the Canal Zone from the United States to Panama. Plaintiffs contend that these negotiations illegally infringe Congress' exclusive authority, under Article IV, section3, of the Constitution, to dispose of all territory belonging to the United States.

Subsequent to the filing of the complaint for declaratory relief, plaintiffs, on February 8, 1977, filed a motion for a preliminary injunction to restrain defendants from taking any action to disturb the status quo in the Canal Zone. On February 23 defendants moved to dismiss the action. At a joint hearing on the motions February 28, the court denied from the bench the motion for a preliminary injunction; on March 2 written findings of fact and conclusions of law were filed in support of that ruling. On the same day plaintiffs filed a notice of appeal. Despite this appeal, this court retains jurisdiction over aspects of the case not involving the motion for a preliminary injunction, including the pending motion to dismiss. *Phelan v. Taitano*, 233 F.2d 117, 119 (9th Cir. 1956).

In denying plaintiffs' motion for a preliminary injunction, the court held that plaintiffs could satisfy none of the four requirements for a preliminary injunction found in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). Among the court's conclusions of law was a determination that plaintiffs were not likely to succeed on the merits because of threshold justiciability considerations. This memorandum opinion discusses in somewhat more detail these considerations which serve to deprive the court of jurisdiction and to require the dismissal of this action.

I. *Ripeness for Review*

The basic principle of the law of ripeness has been summarized in this fashion:

> Judicial machinery should be conserved for problems which are real and present or imminent, nor squandered on problems which are abstract or hypothetical or remote.

K. Davis, *Administrative Law Text* 396 (3d ed.1972). Even in a case in which a declaratory judgment is sought, plaintiffs must show that there is a concrete, presently existing controversy. The complaint must allege the immediate likelihood, if not the already accomplished fact, of actual direct injury. The injury of which plaintiffs complain cannot be conjectural or hypothetical. *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Golden v. Zwickler*, 394 U.S. 103 1969).[2]

Here the complaint alleges only a "threatened disposition by the executive branch of government of United States property in the Canal Zone to the Republic of Panama and the substitution therein of Constitution and Laws of such Republic in the place and stead of the presently applicable laws of the United States."[3] Since no one, not even the negotiators, yet knows the exact contours of any proposed agreement–or even whether there will be an agreement–the

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[2] In oral argument on February 28, 1977, plaintiffs' counsel attempted to distinguish all of the cases cited by defendants on the issue of ripeness. This effort, however, proves nothing. The concept of ripeness is one which is fundamental to our jurisprudence and is, moreover, constitutionally required. See U.S. Const. Art. III. Problems of ripeness may emerge in an endless variety of factual circumstances, and application of the doctrine is certainly not limited to circumstances presented in prior Supreme Court cases.

[3] Complaint ¶1.

injury alleged here is conjectural in the purest sense.[4] The process of negotiation, according to undisputed information from defendants, has been ongoing for thirteen years,[5] and there is no firm indication of how much longer they will continue before some agreement is reached. In that context, it is difficult to see how any injury to plaintiffs could be "real and immediate" in nature. *See Golden v. Zwickler, supra*, 394 U.S. at 109-10.

Plaintiffs argue that the case is ripe because the executive branch has clearly stated its intentions with respect to disposition of the Canal Zone. They fear that, if the case is not heard now on the merits, the executive will present the courts and the Congress with a *fait accompli*, a fully negotiated treaty, which will somehow circumvent Congress' prerogatives in this area. The mere stating of intentions are not, however, sufficient to create a controversy ripe for adjudication. *See International Longshoremen's and Warehousemen's Union v. Boyd*, 347 U.S. 222 (1954). Almost by definition, such a situation lacks the immediacy and concreteness necessary for proper judicial consideration. And, in any event, it appears doubtful that the executive will be able to avoid the power of Congress in this matter since any treaty negotiated will be presented to the Senate for approval and perhaps to the entire Congress for implementing legislation.

There are simply too many contingencies involved in this suit. If the treaty is successfully negotiated, if that treaty's

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[4] The conjectural nature of the alleged injury is underscored by the admission in the complaint, ¶10, that "the extent to which the defendants may have committed the United States to such a course of action is not fully known."

[5] Affidavit of William H. Luers, Acting Assistant Secretary of State for Inter-American Affairs, ¶4.

terms are inconsistent with plaintiffs' interests, and if the treaty is ratified by the Senate, plaintiffs' alleged injury may be redressable in the courts. Failing one or more of those contingencies, plaintiff's action is nonexistent because it does not satisfy the requirement of Article III of the Constitution that the courts consider only actual cases or controversies.

II. *The Political Question Doctrine*

Defendants also argue that the essence of plaintiffs' complaint is a request to the court to intervene in the executive's efforts to renegotiate the Canal Zone treaty. Such interference, according to defendants, would constitute a violation of the political question doctrine, a tenet of judicial restraint springing primarily from notions of separation of powers inherent in our government. Perhaps the most comprehensive treatment of the political question doctrine is found in *Baker v. Carr*, 369 U.S. 186, 217 (1962), where the court stated:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordiante political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Defendants appear to contend that this is a political question because it features a "textually demonstrable constitutional commitment of the issue" to the executive branch. Though the Constitution does not expressly state that the executive's power is exclusive in the area of foreign affairs, this is the generally accepted view with certain exceptions such as the right of the Senate to advise and consent with respect to treaties. *See* U.S. Const., Art. II, § 2. Clearly the power of the executive is exclusive in the area of treaty negotiation:[6]

> [In foreign affairs] the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. . . .
>
> *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936).

The Supreme Court has held that, in general, questions relating to foreign policy are precluded from judicial review because such matters are committed to the executive and legislative branches of government. *Chicago and Southern Airlines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1936). The question presented by plaintiffs' complaint, involving at least a potential conflict between the executive and legislative branches as to the proper interpretation of the Constitution, may not, however, be the

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[6] Article II, § 2, of the Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

sort which is committed to the discretion of the nonjudicial branches. The aspect of the political question doctrine on which defendants primarily rely, the "textually demonstrable commitment" to one branch or another, has been narrowed by the Supreme Court's Decision in *Powell v. McCormack*, 395 U.S 486 (1969), where the Court agreed to review the House of Representatives' exclusion of Adam Clayton Powell over objections that the matter presented a political question. The Court held that a political question may not exist when determination of an issue would "require no more than an interpretation of the Constitution" because "[s]uch a determination falls within the traditional role accorded courts to interpret the law." *Id.* at 548. To the extent that this case calls for an interpretation of the proper constitutional allocation of responsibility between Congress and the executive it is thus at least arguable that a political question is not presented.[7]

This analysis does not take into account, however, the very substantial effect which any decision by this court might have upon the negotiating process—and treaty negotiations are indisputably matters for the executive and not for the judiciary. The Court in *Baker v. Carr, supra*, observed:

> Our cases in this field [foreign relations] seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling *in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.*

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[7] *But see Gravel v. Laird*, 347 F.Supp. 7, 9 (D.D.C. 1972).

369 U.S. at 211-12 (emphasis added). In light of the posture which this case comes before the court and the possible consequences of judicial action, the court must conclude that judicial review is barred, at least at this point, by the political question doctrine. Even a declaratory judgment, as opposed to the injunctive relief which the court earlier denied, might have a serious adverse effect on the treaty process and should, as a matter of judicial discretion if not constitutional law, be avoided. Even if, as plaintiffs argue, the executive is negotiating terms which rightly should be decided by Congress rather than the executive, this court is without power to interfere in any way with the sensitive process of treaty negotiation.

III. *Standing to Sue*

The court of appeals for this circuit has recently elaborated upon the standards required for a showing of standing by plaintiffs who are members of the United States Congress. *Harrington v. Bush*, No. 75-1862 (D.C. Cir. Feb. 18, 1977); *Metcalf v. National Petroleum Council*, No. 76-1223 (D.C. Cir. Feb. 18, 1977). As with other plaintiffs, the basic inquiry involves a determination whether there has been an allegation of injury in fact. *Harrington v. Bush, supra*, slip opinion at 26-28. A Congressman who seeks to sue in his capacity as a Congressman must demonstrate that the acts of which he complains somehow frustrate him in his legislative role. The leading case finding standing in a Congressman is *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), where a Senator challenged the President's use of the so-called "pocket veto" to render ineffective certain legislation without forcing a vote to override the veto or without even vetoing the bill in fact. After passage of the Family Practice of Medicine Act in the fall of 1970, Congress adjourned before the President

had acted either to sign or to veto the bill, and subsequently the President issued a statement that he would withhold his signature from the bill, thus effectively "pocket vetoing" it. Senator Kennedy sought a declaratory judgment that the bill had become law even without the President's signature. The issue of standing was raised at the threshold, but the court of appeals found that he, as a lone Senator, had standing even though he had not been authorized to bring suit by Congress. The court held that "an individual legislator has standing to protect the effectiveness of his vote with or without the concurrence of other members of the majority." 511 F.2d at 435.

In *Harrington v. Bush, supra,* the court of appeals was confronted with a very different suit brought by a Congressman. Representative Harrington sought a declaration that certain activities of the CIA were illegal and an injunction barring the CIA from committing these allegedly illegal acts. On appeal from a dismissal for lack of standing, he asserted a number of interests which were purportedly affected by CIA activities, but these interests essentially amounted to a fairly generalized claim of injury to his effectiveness as a legislator. He could allege no specific piece of legislation on which he had voted which would be rendered ineffective by CIA activities. Affirming the dismissal by the court below, the court of appeals distinguished this case from *Kennedy v. Sampson:*

> Thus, the concern expressed in *Kennedy* over injury to a future vote is quite limited, since the future vote in question was a constitutionally prescribed follow-up to the vote already cast on the same precise legislative bill. In this case appellant draws no such connection between

> his past and future votes but relies on an impairment of future unspecified votes standing al alone. The nature of the impairment asserted in *Kennedy* was the complete withdrawal of the opportunity to cast the future vote; appellant in this case relies on uncertainty due to the lack of information as the injury to his future votes. Thus, once again appellant has posited a quite different case from that presented in *Kennedy.*

Harrington v. Bush, supra, slip opinion at 41. The court also noted that the fact that the alleged impairment was to occur in the future made the Congressman's claim a remote and speculative one. *Id.* at 35. Under those circumstances, the court held that the complaint had stated no judicially cognizable injury. *Id.* at 43.

Here the Congressmen allege only that "[a]ny disposition by executive action would deprive the Congressional plaintiffs of their right to consider appropriate legislation under the applicable rules of the two houses of Congress and to exercise their right to vote on legislation fixing the statutory conditions, if any, under which any such disposition would be permitted."[8] As in *Harrington,* any alleged injury to their legislative capacity will occur only in the future and is thus speculative and remote. Furthermore, it is not at all clear that executive action in this area would deprive the Congressmen of their right to exercise ultimate control over disposition of the Canal Zone, especially in the case of the Senators who are plaintiffs since any treaty must be ratified by the Senate. The mandate of the *Harrington* court is that such "subjective, speculative injury" cannot form the basis of standing in

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[8] Complaint ¶14.

suits by Congressmen, particularly where the suit, as here, raises difficult questions of the constitutional separation of powers. *See Id.* at 48.

The more general allegations of standing must also fall. The Supreme Court has held in *Scheslinger v. Reservists to Stop the War*, 418 U.S. 208, 226-27 (1974), that individual citizens in their capacities as citizens do not have standing to challenge government actions unless they have some more personal concrete stake than the general populace. That case also made clear that these plaintiffs do not have standing as taxpayers. Taxpayer standing is available only to contest exercise of the congressional power under the taxing and spending clause. *Flast v. Cohen*, 392 U.S. 83 (1968). *Schlesinger* held that the mere fact that governmental action may eventually have some impact on the taxpayers is not sufficient under the *Flast* rationale to establish standing. 418 U.S. at 227-28. Finally, Mr. Drummond, the plaintiff who is a U.S. citizen resident of the Canal Zone, might arguably have standing to protest the removal of his Bill of Rights protections in the event that the Zone is given back to Panama were it not for the fact that such a claim is clearly not ripe at this time. There is as yet no firm indication that Bill of Rights protections in the Zone will be abrogated by any treaty. In other words, his claim of injury is too speculative and lacking in the concrete adversariness which is required for federal jurisdiction.

IV. *Conclusion*

In light of the foregoing analysis, there is no need to reach defendants' final argument, that the complaint fails to state a claim upon which relief can be granted. The determination by this court that plaintiffs' claim is premature, that the case in its present posture raises a nonjusticiable political question, and that plaintiffs have no standing to seek relief in this matter precludes the court from considering the merits of the controversy at this time. The court, therefore, must order this action dismissed. An appropriate order accompanies this memorandum opinion.

/s/ Thomas A. Flannery
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JESSE A. HELMS, et al.,
Plaintiffs,

v. Civil Action No. 77 - 83

CYRUS VANCE, et al.,
Defendants.

FILED
MAR 23 1977
JAMES F. DAVEY, Clerk

ORDER

This matter came before the court on defendants' motion to dismiss. After consideration of the motion, the memoranda submitted in support thereof, opposition thereto, oral argument thereon, and the entire record herein, and for the reasons stated in the accompanying memorandum opinion, it appears to the court that the action has been brought prematurely, that in its current posture it presents a nonjusticiable political question and that plaintiffs lack standing to sue for the relief sought here. Accordingly, it is, by the court, this 23rd day of March, 1977.

ORDERED that defendants' motion to dismiss be, and the same hereby is, granted; and it is further

ORDERED that this action is hereby dismissed.

/s/ Thomas A. Flannery
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JESSE A. HELMS et al.,
Plaintiffs,

v. Civil Action No. 77 - 83

HENRY A. KISSINGER, et al.,
Defendants.

Filed
Mar 2 1977
JAMES F. DAVEY, Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the court on plaintiffs' motion for a preliminary injunction. Upon consideration of the motion, memoranda submitted in support thereof, opposition thereto, oral argument thereon, and the entire record herein, the court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiffs Jesse A. Helms, James A McClure and Strom Thurmond are members of the United States Senate, and plaintiffs Daniel J. Flood, Lawrence P. McDonald and M. Gene Snyder are members of the United States House of Representatives. Plaintiff William R. Drummond is a citizen of the United States who resides in the Panama Canal Zone and who seeks to sue on behalf of the class of all United States citizens residing in the Canal Zone.

2. Plaintiffs' complaint seeks a declaration by the court to the effect that the power of Congress is exclusive concerning disposition and control of the Canal Zone and that

current negotiations being conducted by the State Department illegally infringe the exclusive right of Congress to dispose of the Canal Zone and other United States territory.

3. The congressional plaintiffs sue to protect their "right to consider appropriate legislation" concerning the Canal Zone, and plaintiff Drummond sues to protect his civil rights and access to United States courts which were established by Congress. Complaint ¶14. All plaintiffs also sue as individual citizens and as taxpayers. *Id.* ¶5.

4. The process of renegotiating the Panama Canal treaty has continued through the past three administrations over a span of thirteen years and continues to the present administration.

5. The negotiations over the proposed new treaty between the United States and Panama have proceeded under the direction of defendants Vance and Bunker. President Carter has announced that he expects the negotiations to be completed by June of 1977.

6. Negotiations between the United States and Panama concerning the terms of the proposed new treaty are currently at a delicate stage, and any order from the court restricting the executive branch in its negotiations with Panama could have a deleterious effect on relations between the United States and Panama and on the prospects for a renegotiated treaty. Affidavit of William H. Luers, Acting Assistant Secretary for Inter-American Affairs. Department of State,

7. The executive branch has represented that it fully intends to comply with constitutional procedures in effecting any treaty which is negotiated with Panama. Upon

completion of the negotiations, the treaty is to be presented to the Senate for its advice and consent to ratification. The executive branch has no plans to alter the status quo in the Canal Zone by unilateral action prior to ratification of the proposed treaty. Affidavit of William H. Luers ¶7.

8. On February 8, 1977, plaintiffs moved for a preliminary injunction in order to bar defendants from changing the status quo in the Canal Zone during the pendency of this suit; more specifically, plaintiffs sought an order requiring the executive to oppose any acts of sovereignty in the Canal Zone by Panamanian forces until the legal questions presented by this suit were resolved.

Conclusions of Law

1. Under *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958), plaintiffs must show four things in order to obtain a preliminary injunction: (1) that they are likely to succeed on the merits; (2) that, in the absence of injunctive relief, they will be irreparably injured; (3) that the issuance of an injunction would not harm the interests of the opposing party; and (4) that the public interest would be served by the granting of an injunction.

2. This action faces serious problems at the threshold. Defendants have interposed a number of jurisdictional bars to the granting of the relief sought by plaintiffs, all of them having to do with the justiciability of the claim. First, there is a strong possibility that plaintiffs' claim poses a non-justiciable political question, at least insofar as the relief sought would in any way interfere with ongoing treaty negotiations. *See United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936). Despite the fact that plaintiffs have not asked the court

directly to enjoin the negotiating process, the court believes that the requested relief might have the same effect and could possibly embarrass the executive in its conduct of foreign affairs. *See Baker* v. *Carr*, 369, U.S. 186, 217 (1962). Second, it is apparent that this dispute is not yet ripe for adjudication. Plaintiffs admit that the are unable to say from personal knowledge that the State Department or any other portion of the executive branch "has any presently firm intention of turning over a portion of the Zone to Panamanian forces." Affidavit of Senator Jesse Helms ¶11. Under those circumstances, the claim "involves too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222, 224, (1954). Finally, recent decisions of the court of appeals for this circuit raise grave doubts as to the standing of at least the congressional plaintiffs to pursue this action. *Harrington* v. *Bush* (D.C.Cir. Feb. 18, 1977); *Metcalf* v. *National Petroleum Council* (D.C. Cir. Feb. 18, 1977). Therefore, it cannot be said that plaintiffs are likely to succeed on the merits of their claim since the court may be barred by notions of justiciability from reaching the merits at all.

3. The possibility of any injury at all to these plaintiffs is extremely remote and speculative. Even if such injury occurred, the court cannot say that it would be irreparable in view of the fact that any treaty negotiated by the executive must be submitted to the Senate for advice and consent and perhaps to the entire Congress for implementing legislation. Even if the treaty were ratified, there would remain the possibility that Congress could pass legislation superceding the treaty.

4. According to the undisputed affidavit of Mr. William

H. Luers, Acting Assistant Secretary for Inter-American Affairs, the issuance of any order which might limit the scope of the ongoing negotiation could result in the complete breakdown of the negotiations. Such a result would obviously harm the interests of defendants in their official capacities as respresentatives of the executive branch.

5. Issuance of an injunction in this case would also not serve the public interest but would, to the contrary, pose grave risks for peaceful resolution of problems in the Canal Zone.

6. The court must, therefore conclude that plaintiffs have failed to meet any of the four requirements for issuance of a preliminary injunction. In an appropriate order accompanying these findings of fact and conclusions of law, the court will deny the motion for a preliminary injunction.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

Dated: 3-1-77

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JESSE A. HELMS, et al.,
Plaintiffs,

v.

HENRY A. KISSINGER, et al.,
Defendants.

Civil Action No. 77-83
FILED
MARCH 2 1977
JAMES F. DAVEY, Clerk

ORDER

This matter came before the court on plaintiffs' motion for a preliminary injunction. Upon consideration of the motion, memoranda submitted in support thereof, opposition thereto, oral argument thereon, and the entire record herein, and for the reasons stated in the accompanying findings of fact and conclusions of law, it appears to the court that plaintiffs have failed to show that they are likely to succeed on the merits, that they will suffer irreparable injury in the absence of injunctive relief, that defendants' interest would not be harmed by the issuance of an injunction, or that the public interest would be served by the relief sought. Accordingly, it is by the court this 1st day of March, 1977,

ORDERED that plaintiffs' motion for a preliminary injuniction be, and the same hereby is, denied.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Jesse A. Helms, et al
Plaintiffs,

v.

Civil Action
No. 77-83

Cyrus R. Vance, et al
Defendants

AFFIDAVIT OF WILLIAM H. LUERS

Before the undersigned, a duly qualified and commissioned notary public, there personally appeared William H. Luers, who, having been duly sworn, did depose and say that the following is true to the best of his knowledge and belief:

1. I have been Acting Assistant Secretary for Inter-American Affairs, Department of State since January 20, 1977. I have been a Deputy Assistant Secretary for Inter-American Affairs since March 20, 1975. Prior to that time I served for a total of six years in various Inter-American Affairs posts.

2. I am the senior officer within the Department of State specifically charged with the development and implementation of U.S. policy toward Latin America. My area of responsibility includes United States relations with Panama.

3. While our current negotiations with Panama aimed at the conclusion of a new Canal treaty are being con-

ducted by a special negotiating group under the direction of the Secretary of State, I have followed these negotiations closely and contributed to the policy guidance provided the team because of their unique significance for U.S. relations with not only Panama but the entire Latin American region. In recent years the other Latin American nations have strongly supported Panama's quest for a more modern treaty. They have made the negotiation of a new treaty a major hemispheric issue as well as a general test of U.S. intentions regarding all of Latin America.

4. The commitment of the Executive Branch to negotiate a new Panama Canal treaty spans nearly thirteen years and four Administrations – two Democratic and two Republican. Following riots in the Canal Zone in 1964 which resulted in many deaths, President Johnson consulted with former Presidents Hoover, Truman, and Eisenhower and concluded that the best way to protect U.S. interests in the Canal would be to negotiate a new treaty. Discussions begun later that year resulted in the initialling of three draft treaties in 1967. These were never signed, however, because of concerns in both the United States and Panama. The Nixon Administration renewed the negotiating effort, but the 1971-72 round ended in a stalemate which led to a United Nations Security Council meeting in Panama in 1973 where the United States was forced to exercise its right of veto for only the third time in its history. Finally, in February 1974, Secretary of State Henry Kissinger and Panamanian Minister of Foreign Affairs Juan Antonio Tack agreed upon a Joint Statement of Principles which provided the framework for the present round of negotiations. Both Presidents Ford and Carter have authorized the continuation

of talks based on the general points outlined in the 1974 Joint Statement.

5. Our talks with Panama have been exceptionally difficult because of the nature and extent of the interests at stake for each party. We are seeking a new formula for sharing rights and responsibilities for the Panama Canal between the two countries in such a way as to give greater recognition to Panama's just aspirations, while protecting our basic national interest in having a Canal that is open, efficient, secure, and neutral. Our negotiating team is presently engaged in its fifteenth session in Panama of the current negotiating round, and we have made significant progress toward reaching an agreement on the terms of a new arrangement for the Canal.

6. The issues currently under discussion are the most delicate and difficult to resolve. For that reason, the negotiations are now peculiarly vulnerable to external factors, and their successful conclusion requires that the momentum which has been established not be broken.

7. The Executive Branch has consistently made clear that it will comply fully with Constitutional procedures in concluding and implementing any agreement it may reach with Panama. The framework of a new relationship regarding the Panama Canal would be incorporated in a treaty, and, accordingly, would be submitted to the Senate for its advice and consent to ratification. Similarly, any legislation necessary or appropriate to implement the treaty would be sent to Congress according to established practice. The Executive Branch is not in position, before the terms of a treaty are established, to determine what legislation will be required. However, the Executive would not, and could not, alter the pres-

ent status of the Panamal Canal or the Canal Zone by unilateral action.

8. The issuance of any order which might interrupt or in any way limit the scope of the current negotiations with Panama could cause irreparable damage to the present negotiating effort, as well as to our relations with Panama. It would almost certainly have the practical effect of halting the talks. A judicial order restricting the exercise of the President's Constitutional responsibility to conduct international negotiations in this case could lead to a sharp decline in Panamanian consent for our presence and a political environment in which the possibility of confrontation and bloodshed cannot be ruled out.

/s/ William H. Luers

Subscribed and sworn to before me this 22nd day of February 1977 at Washington, D.C.

/s/ Irene Ingalls
My Commission Expires June 14, 1979

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JESSE A. HELMS, et al.,
Plaintiffs,

v. Civil No. 77 - 0083

CYRUS R. VANCE,

ELLSWORTH BUNKER,

JAMES E. CARTER, JR.
Defendants.

MOTION FOR PRELIMINARY INJUNCTION

Upon the complaint, the attached Points and Authorities and the annexed affidavit of Jesse A. Helms, plaintiffs, acting pursuant to Rule 65 of the Federal Rules of Civil Procedure, move the Court to stay further action by defendants to change the status quo in the Canal Zone pending determination of this action on the merits.

Respectfully submitted,

/s/ Geo. S. Leonard
GEO. S. LEONARD, Esq.
1019 Nineteenth St., N.W.
Washington, D.C. 20036
Attorney for Plaintiffs

February 3, 1977

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JESSE A. HELMS, et al.,
Plaintiffs,

v. Civil No. 77 - 0083

CYRUS R. VANCE,

ELLSWORTH BUNKER,

JAMES E. CARTER, JR.
Defendants.

AFFIDAVIT

CITY OF WASHINGTON
DISTRICT OF COLUMBIA s.s.:

JESSE A. HELMS, a member of the Senate of the United States, being duly sworn, deposes and says:

1. I am a plaintiff in this action, suing in my personal and legislative capacities and submit this affidavit to the Court in support of plaintiffs' motion for a stay order to preserve the *status quo* in the Canal Zone pending a decision on the issue raised by the complaint.

2. In 1902 the Congress passed the Spooner Act which directed the President to enter into negotiations to purchase a right of way for an inter-ocean canal provided that such rights could be secured in perpetuity. In 1904 the United States, referring to the said Act as its authority, entered into a convention with the newly

formed Republic of Panama whereby it did acquire perpetual control of such an area. That area has since been known as the Canal Zone.

3. In 1904 Congress by statute provided for making payments to prior owners and authorized the President to take possession of the Zone, and "until the expiration of the Fifty-Eighth Congress to provide for its governance for the purpose of

> ". . . maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property and religion."

4. In 1911 the then President announced probable completion of the Canal in 1913, noted that the enabling legislation granting his powers had expired and asked Congress for

> ". . . specific statutory authority for its regulation and control. . ."

Congress responded and ratified the actions previously taken by the President and delegated to him governance of the Zone which he has since exercised through the Department of the Army.

5. Over a period of years, Congress has enacted legislation providing civil and criminal laws for the Canal Zone and establishing courts of the United States in which these could be litigated. Such laws were brought together and reenacted in revised form as the Canal Zone Code and replaced the previous codification in the United States Code, Title 48, Chapter 6, which was repealed.

6. Down to the present, the Congress has made certain items of subject legislation and portions of the Judiciary Code applicable to the Canal Zone, its courts and inhabi-

tants, particularly providing for the rights of citizens of the United States resident in that area.

7. In 1974 the State Department announced that it intended to propose a treaty which would renounce the authority of the United States and its courts and law in the Canal Zone and deliver the area to the Panamanian government. The "understanding" so announced has since been referred to as the Kissinger - Tack agreement and a copy of that press release by the State Department is attached to the complaint. The position of the State Department in that release appears to acknowledge the primacy of Congress in saying in part

> " . . . it is expected that some implementing legislation by the Congress as a whole would be required."

8. It is my understanding that in 1975 the State Department endorsed a further unpublished and classified "Conceptual Agreement" (Cong. Rec. 7 Oct. 1975, p. H. 9715) which as drafted by one or the other of the parties provided in part

> "It is agreed
>
> "C. Upon the treaty's becoming effective, the U.S. entity known as the Canal Zone Government shall immediately terminate.
>
> "D. All relations of a private nature shall be subject to Panamanian jurisdiction immediately after the new treaty goes into effect.
>
> . . .

> "F. The Republic of Panama, in the exercise of its sovereignty, shall reassume general police authority in that part of its territory known as the Canal Zone when the new treaty goes into effect."

9. In late 1976 the defendant Bunker with the approval of the former defendants Kissinger and Ford went to Panama City to arrange treaty details and the Panamanian foreign minister then came to Washington meeting with Secretary Kissinger for the same purpose.

10. In early 1977 Mr. Boyd, the Panamanian foreign minister again came to Washington, meeting with Mr. Vance and the latter has announced his intention to go to Panama City on February 10 to further or conclude a draft treaty proposal on the lines of the Kissinger-Tack agreement in direct conflict with the legislation which I have referred to.

11. I cannot say of my personal knowledge that the State Department has any presently firm intention of turning over a portion of the Zone to Panamanian forces before this question of authority can be settled in the Courts. I do however consider it to be a distinct probability.

> a) The year prior to the Kissinger-Tack agreement, the defendant Bunker, in an official and therefore, presumably sanctioned, release (Exh. A. to comp. p. 6) was quoted as having recommended
>
> ". . . that the United States initiate some changes in the nature of the U.S. presence in the Canal Zone without awaiting the conclusion of a new treaty."

b) Presidents Kennedy and Eisenhower by executive order directed the flying of the Panamanian flag in the Zone.

c) President Nixon authorized the sale of Panamanian lottery tickets in the Zone.

d) Fire bombings and other guerrilla activities occurred in 1976 in the Zone which were traced to the satisfaction of the State Department to official Panamanian sanction and Dictator Torrijos of Panama was so informed orally by a United States representative.

e) At least one quasi-official incursion of the Panamanian National Guard has been made into the Zone in recent weeks and I am informed that under the rules of the defendants, no opposing action by the Zone Police Forces was permitted.

f) I am further advised that at least one minor area in the Zone has already been delivered to the control of the Panamanian forces with the approval or direction of the defendants.

12. Defendants are aware of the opposition position in the Congress regarding the Canal Zone. It is not possible to state with any assurance what action the Congress will take if appropriate legislation on the future status of the Canal Zone is submitted to it. As an indicator of its views however, I can refer to the legislative record on the 1975-1976 budgets of the State Department which include allowances for the expense of negotiating with Panama. The 1975 allowance was twice generally approved by the Senate and twice defeated in the House. Finally on the recommendation of a conference committee the House ap-

proved a modified authorization which confined the State Department to negotiations not affecting the "vital interests" of the United States and was so passed in 1975 (Cong. Rec. 7 Oct. 1975, p. H 9721,

> "Sec. 104. It is the sense of the Congress that any new Panama Canal treaty or agreement must protect the vital interests of the United States in the Canal Zone and in the operation, maintenance, property and defense of the Panama Canal."

The same limitation was repeated in 1976 (Cong. Rec. 18 June 1976 p. H 6188).

/s/ Jesse Helms

Sworn to before me in the District of Columbia this 8th day of February, 1977.

Peter L. Huber
NOTARY PUBLIC
Comm. Expires 14 May 78

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JESSE A. HELMS
2820 South Joyce Street
Arlington, Virginia
224 - 6342

JAMES A. McCLURE
3467 North Venice St.
Arlington, Virginia 22207
224 - 2752

STROM THURMOND
6015 Claiborne Drive
McLean, Virginia 22101
224 - 5972

Civil No.

DANIEL J. FLOOD
Suite 812
"C" St., and New Jersey S.E.
Washington, D.C.
225 - 6511

LAWRENCE P. McDONALD
3825 Cobblestone Court
Alexandria, Virginia 22303
225 - 2931

M. GENE SNYDER
11 1;2 - 6th Street S.E.
Washington, D.C. 20003
225 - 3465

and

WILLIAM R. DRUMMOND
6576 - B
Corozal, Canal Zone

Plaintiffs,

v.

HENRY A. KISSINGER
Department of State
Washington, D.C. 20520

ELLSWORTH BUNKER
Department of State
Washington, D.C. 20520

GERALD R. FORD
1600 Pennsylvania Ave., N.W.
Washington, D.C.

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

1. Jurisdiction hereof is given to this Court by Sections 1331, 1343, 1361, and 2201 of Title 28 of the United States Code to declare the respective rights of the parties under Art. IV, Sec. 3, cl. 2 and Amendment 5 of the Constitution of the United States, with respect to the threatened disposition by the executive branch of government of United States property in the Canal Zone to the Republic of Panama and the substitution therein of the Constitution and Laws of such Republic in the place and stead of the presently applicable laws of the United States. Venue is based on 28 U.S.C. § 1391. The matter in controversy exceeds the sum or value of $10,000.

2. Plaintiffs Jesse A. Helms, James A. McClure and Strom Thurmond are duly elected members of the Senate

of the United States having their official addresses in the District of Columbia.

3. Plaintiffs Daniel J. Flood, Lawrence P. McDonald and M. Gene Snyder are duly elected members of the House of Representatives of the United States, having their official addresses in the District of Columbia.

4. Plaintiff William R. Drummond is a citizen of and employed by the United States, is a resident of the Canal Zone, Legislative Chairman of the Canal Zone Central Labor Union, an organization of federal employees and President of Local 1798, American Federation of Government Employees, AFL-CIO, suing herein as an individual and as representative of the class of all United States citizens residing in the Canal Zone.

5. All plaintiffs sue herein in support of their official interest and also as individual citizens and taxpayers to preserve and declare the Constitutional allocation of powers as between the executive and legislative branches of this government.

6. The defendants are respectively the Secretary of State, an Ambassador at Large, and the President of the United States. Defendants are the principal officials in the executive branch of the government having charge under the Constitution and laws of the United States of relations between the Republic of Panama and this counrty. The defendants are sued herein solely in their capacity as officials of the executive branch for a declaration that they are unlawfully assuming powers which belong to the Congress of the United States.

7. Under public law 183 of the 57th Congress, First Session (The Spooner Act) the Congress authorized the

President to acquire perpetual control of the necessary lands for the construction and defense of an interocean canal across the Isthmus of Panama or if such control could not be purchased then to approach Nicaragua for the same purpose. Acting pursuant to the authorization so granted, a convention was negotiated and approved by the then President and Secretary of State between the United States and the Republic of Panama on November 18, 1903 (the Hay-Bunau-Varilla Convention) pursuant to which the United States acquired in perpetuity the rights of the newly founded Republic of Panama to the territory now known as the Canal Zone. Since then, the Canal Zone has remained a territory of the United States administered at the direction of the President of the United State in accordance with enabling legislation enacted from time to time thereafter by the Congress.

8. Such legislation by the Congress has directed the form and substance of the governance of the administration and jurisprudence of the Canal Zone, culminating in a comprehensive revision thereof in Public Law 87 - 845, 76 A. Stat. 1, 48 U.S.C. § § 1301 *et seq.*, the Canal Zone Code, which became effective January 2, 1963, and includes in part a Congressional guarantee of civil rights under the law of the United States to all residents of the Canal Zone (1 C.Z.C. 31) and the establishment of the necessary courts and a judiciary for the enforcement thereof.

9. On February 7, 1974, as shown in the exhibit annexed hereto, the defendant Secretary of State announced that he had personally agreed in principle with the Republic of Panama to arrange for a treaty between the United States and that Republic whereby the United States would be caused to discard the Con-

gressional requirement of perpetual control and would transfer ownership and dominion over the Canal Zone territory and its residents to the Republic of Panama and would arrange for a consent by treaty executed in the name of the United States to abrogate the Canal Zone Code and submit the Zone and its residents to Panamanian law.

10. The issue of right as between the Constitutional authority of Congress over the territories of the United States and the asserted power of the executive branch to dispose of properties of the United States and the liberties of its citizens pursuant to the treaty power has, since the departure of Congress on October 1st, 1976, become one of actual controversy wherein the executive branch has taken active steps to avail itself of the treaty power to accomplish a transfer of the Canal Zone to the Republic of Panama. On information and belief the following steps have been taken since that date although the extent to which the defendants may have committed the United States to such a course of action is not fully known:

a) On or about October 20, 1976 defendant Ellsworth Bunker was sent to Panama to work out treaty terms on the lines of the 1974 (Kissinger-Tack) statement of principles.

b) On or about December 3, 1976 defendant Henry A. Kissinger conferred on the provisions of such a treaty in Washington with Sr. Aquilino Boyd, Foreign Minister of the Republic of Panama and plaintiffs believe that agreement in principle was reached

along the lines set forth in the 1974 statement.

c) On or about December 16, 1976 the defendant Bunker returned to Panama City for the finalization of a draft of such a treaty.

11. There is a clear and present danger that pursuant to executive order or treaty proposal, defendants intend to conclude this matter without prior legislative direction from the Congress as shown by the following:

a) Secretary of State designate Cyrus R. Vance has publicly stated that the United States is bound to carry out the commitments of the 1974 Kissinger-Tack agreement. On January 13, 1977, Mr. Vance announced that Mr. Aquilino Boyd will come to Washington one week after the forthcoming inaugural for further negotiation of such an agreement.

b) Panamanian foreign minister Boyd has publicly quoted defendant Kissinger as stating that a new treaty would be entered into in 1977 to cede all or a major portion of the Canal Zone territory to the Republic of Panama.

c) The ambassador-designate to the Organization of American States is the former Senator Gale McGee who was in Panama in 1974 with Kissinger and who joined in concurring with the 1974 statement.

d) Mr. Sol Linowitz, who is the Chairman of a "Commission on Latin America" which recommended cession of the Canal Zone to Panama by treaty has been asked by the incoming administration to act as co-negotiator with defendant Bunker on the future ownership of the Canal Zone.

e) President-elect Carter announced on January 13, 1977 that such a new treaty would be completed by June 1977, and defendant Bunker has confirmed that it would be completed by that time.

12. Mr. Linowitz was formerly United States ambassador to the Organization of American States under President Lyndon Johnson, during a time when the Department of State negotiated three draft treaties to abrogate the 1903, 1936 and 1955 treaties (which continued the Congressional requirement of perpetual control) and would have provided for the cession of Canal Zone territory to the Republic of Panama and submission of United States citizens resident in the Canal Zone to Panamanian law in derogation or repeal by treaty of the Canal Zone Code. These drafts were not officially submitted to the Senate or ratified but their terms collectively are substantively similar to the terms of the 1974 Kissinger-Tack agreement of which defendant Kissinger publicly stated:

> "In the President's name, I hereby commit the United States to complete this negotiation successfully and as quickly as possible."

13. The President of the United States is named herein as a party by reason of the fact that properties of the

United States have heretofore been transferred to other nations by executive order and the Congressional plaintiffs have been given reason to believe that the same procedure might be employed in the case of the Canal Zone, in order to create a *fait accompli* to compel subsequent treaty approval.

14. Congress alone has Constitutional authority to determine whether, and the manner in which, territory or other property belonging to the United States shall be disposed of and the jurisprudence which is to be applied to citizens of the United States resident in its territories. Any disposition by executive action would deprive the Congressional plaintiffs of their right to consider appropriate legislation under the applicable rules of the two houses of Congress and to exercise their right to vote on legislation fixing the statutory conditions if any, under which any such disposition would be permitted, and would deprive plaintiff Drummond of the civil rights and access thereon to the courts which were established by Congress.

WHEREFORE,

Plaintiffs pray a declaration of the exclusive Constitutional authority of the Congress in the premises, reserving their right to seek other and further relief if and when circumstances warrant it.

/s/ GEO. S. LEONARD, Esq.
1019 Nineteenth St., N.W.
Washington, D.C. 20036
(202) 223 - 1080

January 14, 1977

Attorney for Plaintiffs

NEWS RELEASE
BUREAU OF PUBLIC AFFAIRS

Department of State
Office of Media Services

U.S., PANAMA AGREE ON PRINCIPLES FOR CANAL NEGOTIATIONS

FOR IMMEDIATE RELEASE
February 7, 1974

The Statement of Principles signed today by Secretary of State Kissinger and Foreign Minister Tack of Panama opens a new phase in the negotiations between the United States and Panama on a modern canal treaty.

In September 1973 Secretary Kissinger charged Ambassador at Large Ellsworth Bunker with renewing discussions with Panamanian officials for the purpose of arriving at a common approach to future treaty negotiations. Ambassador Bunker visited Panama November 26 to December 3, 1973 and again on January 6 and 7, 1974 to discuss with Panamanian Foreign Minister Tack general principles upon which a new treaty might be based. These discussions have resulted in the Statement of Principles of February 7.

The principles will serve as guidelines for the next round of treaty talks which are expected to get under way in the near future. The principles are general in character and do not address the many specific issues involved in defining the new treaty arrangement. These remain to be negotiated.

The United States welcomes the agreement on principles as a demonstration of how two countries with shared purposes can reach an understanding which fairly balances their interests, rights, and obligations.

Following is the text of the Joint Statement and a background paper on the status of the Panama Canal treaty negotiations:

JOINT STATEMENT BY THE HONORABLE HENRY A. KISSINGER, SECRETARY OF STATE OF THE UNITED STATES OF AMERICA, AND HIS EXCELLENCY JUAN ANTONIO TACK, MINISTER OF FOREIGN AFFAIRS OF THE REPUBLIC OF PANAMA, ON FEBRUARY 7, 1974 AT PANAMA

The United States of America and the Republic of Panama have been engaged in negotiations to conclude an entirely new treaty respecting the Panama Canal, negotiations which were made possible by the Joint Declaration between the two countries of April 3, 1964, agreed to under the auspices of the Permanent Council of the Organization of American States acting provisionally as the Organ of Consultation. The new treaty would abrogate the treaty existing since 1903 and its subsequent amendments, establishing the necessary conditions for a modern relationship between the two countries based on the most profound mutual respect.

Since the end of last November, the authorized representatives of the two governments have been holding important conversations which have permitted agreement to be reached on a set of fundamental principles which will serve to guide the negotiators in the effort to conclude a just and equitable treaty eliminating, once and for all, the causes of conflict between the two countries.

The principles to which we have agreed, on behalf of our respective governments, are as follows:

1. The treaty of 1903 and its amendments will be abrogated by the conclusion of an entirely new interoceanic canal treaty.
2. The concept of perpetuity will be eliminated. The new treaty concerning the lock canal shall have a fixed termination date.

3. Termination of United States jurisdiction over Panamanian territory shall take place promptly in accordance with terms specified in the treaty.

4. The Panamanian territory in which the canal is situated shall be returned to the jurisdiction of the Republic of Panama. The Republic of Panama, in its capacity as territorial sovereign, shall grant to the United States of America, for the duration of the new interoceanic canal treaty and in accordance with what that treaty states, the right to use the lands, waters, and airspace which may be necessary for the operation, maintenance, protection and defense of the canal and the transit of ships.

5. The Republic of Panama shall have a just and equitable share of the benefits derived from the operation of the canal in its territory. It is recognized that the geographic position of its territory constitutes the principal resource of the Republic of Panama.

6. The Republic of Panama shall participate in the administration of the canal, in accordance with a procedure to be agreed upon in the treaty. The treaty shall also provide that Panama will assume total responsibility for the operation of the canal upon the termination of the treaty. The Republic of Panama shall grant to the United States of America the rights necessary to regulate the transit of ships through the canal, to operate, maintain, protect and defend the canal, and to undertake any other specific activity related to those ends, as may be agreed upon in the treaty.

7. The Republic of Panama shall participate with the United States of America in the protection and de-

fense of the canal in accordance with what is agreed upon in the new treaty.

8. The United States of America and the Republic of Panama, recognizing the important services rendered by the interoceanic Panama Canal to international maritime traffic, and bearing in mind the possibility that the present canal could become inadequate for said traffic, shall agree bilaterally on provisions for new projects which will enlarge canal capacity. Such provisions will be incorporated in the new treaty in accord with the concepts established in principle 2.

BACKGROUND AND STATUS OF THE PANAMA CANAL TREATY NEGOTIATIONS

The United States and Panama are currently involved in negotiations for a new treaty to replace the Treaty of 1903 relating to the Panama Canal.

In that treaty Panama granted to the United States – in perpetuity–the use of a 10-mile wide zone of Panamanian territory for the "construction, maintenance, operation and protection" of a canal, as well as all the rights, power and authority within that zone which the United States would "possess if it were the sovereign." The very favorable treaty for the United States was the major reason for its decision to build the canal in Panama rather than in Nicaragua as initially planned.

Value of Canal

Since its opening in 1914, the canal has provided benefits to the United States, to Panama, and to the world without any increase in toll rates. The first increase (19.7% effective July 1, 1974) has recently been proposed by the Panama

Canal Company because of current and projected losses due to recent increases in operating costs. In fiscal year 1973 the company sustained a net operating loss of more than $1 million.

Some 70 percent of the tonnage through the canal in recent years has either originated in, or been destined for, the United States. That tonnage has represented about 16 percent of the total of U.S. export and import tonnages. The proportions of exports and imports which move through the canal to and from the Latin American countries bordering upon the Caribbean and the Pacific, however, greatly exceed the U.S. proportion of 16 percent.

The canal has also served Panama well. Panama's position in the world is, in large measure, the result of the existence of the canal in its territory. More than 40 per cent of Panama's foreign exhange earnings, and nearly one-third of its gross national product, are directly or indirectly attributable to the presence of the canal.

Panamanian Treaty Concerns

Panama has been dissatisfied with the treaty for many years. Part of this dissatisfaction has derived from Panama's views of two aspects of the negotiation of the Treaty of 1903: (1) that Panama's dependence upon the United States to protect its new-found independence from Columbia placed it in a position in which it felt that it had to accede to U.S. desires respecting the content of the treaty; and (2) that Panama's principal negotiator was a Frenchman who stood to benefit considerably if the United States purchased the private French concession to build a trans-isthmian canal.

Over the years, Panama has also charged that the United States has unilaterally interpreted the treaty to Panama's

disadvantage, and given Panama an inadequate share of the benefits from the operation of the waterway. Even more objectionable in Panama's view are the provisions in the Treaty of 1903 which give governmental jurisdiction within a portion of Panamanian territory to a foreign power in perpetuity.

The United States has responded sympathetically to some of these Panamanian concerns. In 1905 it recognized Panama's titular sovereignty over the Canal Zone. The treaty was revised in 1936, and again in 1955, to provide Panama with a greater share of the economic benefits of the canal and to remove certain outdated aspects, such as the right granted to the United States to interfere, when it believed necessary, in Panama's internal affairs. Despite these modifications, however, many of the features of the treaty most objectionable to Panama remain unchanged.

The canal has become the major political issue in Panama, and the intensification of Panama's campaign for more favorable treaty terms in recent years has produced tensions in U.S. – Panamanian relations. In 1964 a flag-raising incident in the Canal Zone led to riots which resulted in the death of 20 Panamanians and 4 Americans and brought the Panama Canal issue to the attention of the United Nations and the Organization of American States (OAS).

Bilateral Negotiations on New Treaty

Following discussion of the issue in the OAS, UN, and other international agencies, the U.S. and Panama agreed in 1964 to begin bilateral negotiations for a new treaty. In so doing, the U.S. recognized that a comprehensive modernization of its relationship with Panama corresponded to its long-term national interests and to a changing international environment.

U.S. officials entered the negotiations in late 1964 with three basic objectives:

– – The canal should continue to be available to the world's commercial vessels on an equal basis at reasonable tolls;

– it should be operated and defended by the United States for an extended, but definite, period of time;

– it should serve world commerce efficiently. To this end, the United States should have the right to provide additional canal capacity when it is needed.

By 1967, the negotiators of both countries had prepared three draft treaties. They provided for operation of the present canal under a joint U.S. –Panamanian authority; for construction and operation of a sea-level canal under a similar joint authority; and for U.S. defense of the old and new canals for the duration of each treaty. Neither Panama nor the United States Government moved to ratify these treaties, and the new government headed by General Omar Torrijos, which assumed power in October 1968, formally rejected them.

In 1970 the Government of Panama requested the renewal of negotiations and the U.S. agreed. President Nixon established negotiating objectives similar to those set by President Johnson in 1964, although modified by developments since that time. The objectives and positions of the United States thus reflect a bipartisan approach to treaty negotiations with Panama. They also are consistent with the broader policies stated in the President's 1972 Foreign Policy Report to the Congress. In that report he made it clear that our policy is not to seek to dominate Latin American nations but rather to develop with them a mature and stable partnership.

The Panamanian negotiating team arrived in Washington in June, 1971. Intensive negotiations during the rest of the year resulted in a U.S. treaty offer covering most of the issues relevant to the treaty. The Panamanian negotiators carried the offer to Panama for review in December, 1971. Except for some informal conversations in March, 1973, and an exchange of correspondence in in the fall, the negotiations were not resumed until December, 1972, when a U.S. delegation travelled to Panama.

The new talks were not productive. Panama presented the United States with a comprehensive reply to its offer of December, 1971, but in many respects Panama's proposal reflected its maximum treaty aspirations and did not acknowledge the proposed compromise developed during the negotiations in 1971. Although disappointed, the United States agreed to study the offer and provide a written response, which was delivered in February, 1973.

UN Security Council Action

At Panama's initiative, the U.N. Security Council met in Panama City from March 15-21. In those sessions, Panama criticized the U.S. posture on the canal question and sought a resolution supporting its position. Thirteen nations voted for the resolution; the U.K. abstained. The United States vetoed the resolution on the grounds that it recognized Panama's needs but not those of the United States; that it was incomplete in its references to the negotiations; and that it was inappropriate because the treaty was a bilateral matter under amicable negotiations. In explaining the U.S. position, the U.S. Permanent Representative committed the United States to peaceful adjustment of its differences

with Panama, and invited Panama to continue serious treaty negotiations.

New U.S. Appraoch

After his first visit to Panama in November, 1973, Ambassador Bunker recommended that the United States initiate some changes in the nature of the U.S. presence in the Canal Zone without awaiting the conclusion of a new treaty. With concurrence by the Departments of State and Defense, President Nixon announced on December 28 his intention to submit legislation to the Congress seeking the delivery to Panama of title and jurisdiction over two unused World War II airfields – Old and New France Fields – as well as authorization for the sale of Panamanian lottery tickets in the Zone. The lands in question will be of significant economic benefit to Panama. These legislative requests provide a tangible sign that the United States is prepared to adjust old ways in the Canal Zone to new realities and to conclude a new and modernized treaty relationship with Panama.

Any treaty agreed upon by the negotiators and approved by the Executive Branch will be submitted to the Senate for approval, and it is expected that some implementing legislation by the Congress as a whole would be required. Panama has expressed the intention to ratify the new treay by plebiscite to ensure that it is acceptable to the Panamanian people,

Issues in the Negotiations

The United States and Panama agree that the Treaty of 1903 should be replaced by a modern treaty that rejects

the concept of perpetuity and accommodates the sovereignty of Panama with the interests of the United States, on the understanding that U.S. control and defense of the Panama Canal would continue for a period of fixed durations. Despite this agreement in principle, the two negotiating delegations have thus far been unable to reach an agreement acceptable to both governments on the major issues involved. These are:

1. *Duration.* The United States has proposed that the new treaty provide for continued U.S. control and defense of the present canal for an extended but specific period of time, with provision for further extension in connection with expansion of canal capacity at U.S. expense. Panama has proposed that the new treaty be for a shorter period than that desired by the United States, and has thus far made no proposal for extension in connection with expansion of capacity.

2. *Jurisdiction.* The United States has proposed that Panamanian law and jurisdiction would be applied in the Canal Zone, in some areas immediately, in others over a period of years. Lands now part of the Zone would also be opened up to Panamanian development. The United States would retain only rights which are necessary to the execution of its responsibilities. Panama has accepted this concept in principle, but the extend and duration of U.S. rights remain to be negotiated.

3. *Expansion of Capacity.* Current projections indicate that additional capacity will not be needed unitl the end of this century. The United States seeks long-term options (a) to add a third lane of locks to the present canal and (b) to build a new sea-level canal. Panama has wanted

the United States to make a commitment to start construction within a shorter period or lose all expansion rights.

4. *Land and Water Areas.* The United States has proposed that Canal Zone lands and facilities not needed for canal operation and defense whould be relinquished to Panama. The area still used by the United States for canal operations would be open to Panamanian Government and private activities under arrangements to be established by treaty and would be integrated into the jurisdiction, culture, and economy of Panama. Panama has thus far proposed that the United States control a much smaller area for canal operations and defense than the United States considered necessary.

5. *Defense.* The United States and Panama have agreed that the United States will continue to defend the canal and that Panama will participate. The extend of U.S. defense rights and the nature of Panama's participation remain to be negotiated.

6. *Compensation.* The United States has proposed that the current $2 million annual payment to Panama be replaced by a royalty on tonnage that would yield about $25 million per annum at current traffic rates, and increase as traffic increases. Panama has indicated that the payments proposed by the United States should be greater, but has not specified a formula or an amount that it would consider adequate.

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No. 76-1576

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OCTOBER TERM, 1976

JESSE A. HELMS, ET AL., PETITIONERS

v.

CYRUS R. VANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners, members of Congress and a resident of the Canal Zone, brought this action for declaratory relief against the President, the Secretary of State, and a United States Ambassador, seeking a declaration that current negotiations concerning the status of the Panama Canal Zone infringe Congress' allegedly exclusive constitutional power to dispose of federal property under Article IV, Section 3, of the Constitution.[1] The complaint (Pet.

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[1]Petitioners also sought a preliminary injunction to bar the respondents from changing the status quo in the Canal Zone pending the determination of their action on the merits (Pet. App. 17a). The district court denied petitioners' motion for a preliminary injunction and petitioners appealed (Pet. App. 3a). The court of appeals affirmed the denial of the preliminary injunction at the same time it affirmed the district court's dismissal of the complaint (Pet. App. 1a).

App. 33a-39a) alleges that the respondents intend to transfer ownership and dominion over the Canal Zone to the Republic of Panama in derogation of congressional authority "to determine whether, and the manner in which, territory or other property belonging to the United States shall be disposed of and the jurisprudence which is to be applied to citizens of the United States resident in its territories" (Pet. App. 39a).

The district court dismissed the complaint. The court held, first, that the case was not ripe for judicial review because the harm petitioners alleged was purely speculative (Pet. App. 4a-5a):

> Since no one, not even the negotiators, yet knows the exact contours of any proposed agreement—or even whether there will be an agreement—the injury alleged here is conjectural in the purest sense.

Moreover, the court observed (Pet. App. 5a):

> [I]n any event, it appears doubtful that the executive will be able to avoid the power of Congress in this matter since any treaty negotiated will be presented to the Senate for approval and perhaps to the entire Congress for implementing legislation.

Second, the court held that judicial review of the complaint, "at least at this point" (Pet. App. 9a), is precluded by the political question doctrine. Relying on principles set forth in *Baker* v. *Carr*, 369 U.S. 186, 217, and *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319, the court noted "the very substantial effect which any decision by this court might have upon the negotiating process—and treaty negotiations are indisputably matters for the executive and not for the judiciary" (Pet. App. 8a).

Third, the court held that petitioners lacked standing. The court noted that petitioners' generalized claim that executive negotiations would deprive them of their legislative capacity to consider the appropriate dispositions of the Canal Zone asserted an alleged injury that would occur only in the future, was speculative, and was of doubtful merit in any event, "especially in the case of the Senators who are plaintiffs since any treaty must be ratified by the Senate" (Pet. App. 11a).

The court of appeals summarily affirmed without opinion (Pet. App. 1a).

The decision of the court of appeals was correct and does not warrant further review. There is little to add to the well reasoned opinion of the district court, upon which we rely here.

The district court correctly dismissed the complaint as not ripe for adjudication. As the court noted (Pet. App. 5a), the executive branch has been conducting negotiations with the government of Panama for thirteen years, and petitioner Helms admitted in his affidavit (Pet. App. 29a) that he did not know whether "the State Department has any presently firm intention of turning over a portion of the Zone to Panamanian forces before this question of authority can be settled in the Courts." Moreover, as the affidavit of the Acting Assistant Secretary of State for Inter-American Affairs states (Pet. App. 23a-24a), the executive branch "would not, and could not, alter the present status of the Panama Canal or the Canal Zone by unilateral action," without Senate approval of a treaty. Petitioners' apprehension in that respect is not only speculative but groundless. Since no treaty has yet been negotiated, and any treaty that is negotiated will not become binding until it has been ratified by the

Senate, this suit plainly lacks sufficient immediacy to warrant adjudication on the merits. See *O'Shea* v. *Littleton*, 414 U.S. 488.

The district court also correctly ruled that the complaint presents a non-justiciable political question. Under the Constitution, the conduct of international relations and the negotiation of treaties is primarily, and in some respects exclusively, the province of the President. *United States* v. *Curtiss-Wright Corp.*, *supra*, 299 U.S. at 319. The political question doctrine bars judicial intervention into matters, such as the conduct of delicate treaty negotiations, that are constitutionally committed to one of the political branches of government. *Baker* v. *Carr*, *supra*, 369 U.S. at 211-212.[2]

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[2]Petitioners also have failed to establish that they have standing to bring this suit. Six of the petitioners are members of Congress who claim to sue in their official capacities, on the theory that the Executive's conduct of treaty negotiations may, or allegedly will, impair their ability to consider and vote on the matters under negotiation. Similar contentions were rejected in *Metcalf* v. *National Petroleum Council*, No. 76-1223, decided February 18, 1977 (C.A. D.C.), and *Harrington* v. *Bush*, No. 75-1862, decided February 18, 1977 (C.A.D.C.). The six legislators and Mr. Drummond, who is suing as an individual and purported representative of the class of all United States citizens residing in the Canal Zone, also assert standing "as individual citizens and taxpayers to preserve and declare the Constitutional allocations of powers as between the executive and the legislative branches of this government" (Pet. App. 34a). Such a generalized claim is common to the citizenry at large and insufficient to confer standing. See *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.